ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF THE CITY OF SOUTH BEND, INDIANA FOR RESOLUTION OF DISPUTES OVER REFUNDS TO BE MADE TO CLAY CUSTOMERS	) CAUSE NO. 43071 S1)) APPROVED:	DEC 1 9 2007

BY THE COMMISSION:
David E. Ziegner, Commissioner
Loraine L. Seyfried, Administrative Law Judge

On June 12, 2006, the City of South Bend, Indiana ("South Bend") filed its Petition in Cause No. 43071 with the Indiana Utility Regulatory Commission ("Commission" or "IURC") seeking a resolution of disputes with a group of South Bend's customers that were formerly served by Clay Utilities, Inc. ("Clay Class") over the manner of implementing a refund South Bend wished to make to certain customers of its water utility.

On April 18, 2007, the Commission issued its Order resolving the dispute and establishing the manner in which the refunds were to be made to certain customers. In that Order, the Commission established this subdocket for the purpose of determining the amount of attorney fees and expenses to be awarded to counsel for the Clay Class.

Pursuant to notice duly provided as required by law, an evidentiary hearing was conducted on September 25, 2007 at 9:30 a.m. in Room 224, National City Center, 101 West Washington Street, Indianapolis, Indiana. South Bend, Clay Class, and the Indiana Office of Utility Consumer Counselor ("OUCC") attended the evidentiary hearing. Evidence was presented by the Clay Class.

Based upon the applicable law and the evidence presented herein the Commission now finds:

1. **Notice and Jurisdiction.** Due, legal and timely notice of the evidentiary hearing was provided as required by law. South Bend is a municipality which owns, operates, manages and controls plant and equipment for the distribution of water to the public in and around the City of South Bend. South Bend operates a municipally owned utility as that term is used and defined in Ind. Code § 8-1-2-1. Therefore, the Commission has jurisdiction over the parties and the subject matter of this Cause.

2. **Background and Summary of Relief Requested.** In 1999, South Bend exercised an option to purchase Clay Utilities, Inc.'s assets. Prior to closing on that option to purchase, South Bend operated the Clay Utilities system pursuant to the schedule of rates and charges on file with the Commission for Clay Utilities. That schedule included a charge for public fire protection of $0.94 per month per customer. After exercising the option to purchase, South Bend commenced treating these customers as its own direct customers and commenced applying the schedule of rates and charges generally applicable to South Bend in October, 1999, which did not contain a monthly public fire protection charge. However, for a period of time after purchase of Clay Utilities, South Bend nevertheless continued to bill and collect from the

former customers of Clay Utilities, the $0.94 monthly public fire protection charge.

In May 2006, South Bend offered to refund the $0.94 monthly charges that had been collected from the Clay Class and former customers of Clay Utilities. A dispute arose between South Bend and the Clay Class concerning the amount and manner of the refund and the claim for attorney fees and expenses by the Clay Class' counsel. On June 12, 2006, South Bend filed its Petition in Cause No. 43071 to resolve the dispute.

On April 18, 2007, the Commission issued an Order resolving the dispute concerning the amount of the refund and the manner in which the refunds are to be made. The Commission found that although the Clay Class had incurred attorney fees and expenses in securing the refund, the evidence presented by the parties was insufficient to allow a determination of an appropriate amount of attorney fees and expenses to award out of the refund. Consequently, this subdocket was created to allow the parties the opportunity to present additional evidence for the Commission to make its determination on Clay Class' attorneys' fees and expenses.

Attorneys for the Clay Class request an award for attorney fees and expenses of 40%, or $25,044.08, of the total refund owed to the former customers of Clay Utilities.

3. **Evidence presented**. Counsel for the Clay Class, R. William Jonas, Jr., submitted testimony in support of the request for attorney fees and expenses. Mr. Jonas testified that he is a partner in the law firm of Hammerschmidt, Amaral & Jonas and was retained to represent the Clay Class on several water and sewer issues. He indicated the public fire protection charge refund was only a small portion of his work for the Clay Class. Exhibit RWJ at Q&A 3.

Mr. Jonas testified that he entered into a contingent fee contract with the Clay Class that provides for the payment of attorney fees at the rate of $225 per hour, but caps the amount of attorney fees at 40% of all amounts recovered on the various issues for the Clay Class. Exhibit RWJ at Q&A 4 and Exhibit RWJ-1. He stated that one reason this type of contract was used, was to avoid inequities that could result from a straight hourly contract or percentage fee contract. Exhibit RWJ at Q&A 8. He also stated that percentage contracts are often used for clients with a large number of matters requiring litigation because it allows the legal costs for the client to be spread over the group of cases, rather than having a large expenditure on a particular case that may not have required many hours to resolve. *Id.* He noted that, on the other hand, if these clients paid an hourly rate of service, an attorney fee may consume the amount recovered on a case, which would be inequitable, particularly to the fund participants that may not have been involved in negotiating the fee agreement. *Id.*

Mr. Jonas offered computer print-outs of his billing records. He indicated that Exhibit RWJ-2 includes all work performed on behalf of the Clay Class and Exhibit RWJ-3 contains that portion of his work related to the public fire protection charge. Exhibit RWJ at Q&A 10. However, Mr. Jonas further testified that although the entries in Exhibit RWJ-3 relate only to work performed for the Clay Class, not all of the work performed was directly related to the fire protection charges. *Id.* Because some of the work was attributable to both the fire protection charge and to the other issues of the Clay Class, he stated he apportioned 33% of the total time reflected for this work as being related to the fire protection charge. He opined that he believed

this to be the most equitable apportionment he could make. *Id.* He also noted that he was not requesting fees from any related proceedings. *See* Q&A 13.

Mr. Jonas testified that under the common fund theory, he believed customers that had opted out of the Clay Class should also contribute to the payment of attorney fees and expenses. Exhibit RWJ at Q&A 12. He also argued that case law requires the award of attorney fees to be fair and reasonable based upon the facts of the case and stated that fees reaching 40% of a recovery are quite common. *Id.* at Q&A 14. Finally, he opined that his hourly rate of $225 per hour, capped at 40% of the recovery, was fair based on the complexity of the issues, the risk of non-recovery, and other factors established in Rule 1.5 of the Indiana Rules of Professional Conduct.

The testimony of Robert L. Miller, Sr. was also offered into evidence. Mr. Miller testified that he assisted Mr. Jonas in the representation of the Clay Class as co-counsel. Exhibit RLM at Q&A 7 and 8. Mr. Miller testified as to his research regarding the various issues upon which he represented the Clay Class. *Id.* at Q&A 10. He indicated that Exhibit RLM-1 contains his time sheets related to the fire protection charge, but that he made several adjustments to account for the fact that he did not record his time based upon the issues he was working on. *Id.* He stated that his total fees for work on the fire protection charge are approximately 20% of the total fees applicable to his work on all issues for the Clay Class.

4. **Commission Discussion and Findings.** The Indiana Supreme Court, in *City of Hammond v. Darlington*, 162 N.E.2d 619 (Ind. 1959), recognized an award of attorney fees may be paid from a common fund on the theory that those who benefit from the creation of the fund should share in the expense of producing the benefit. The Commission has the statutory authority to award reasonable attorney fees and costs out of a common fund prior to its distribution. *Northern Indiana Public Service Co. v. Citizens Action Coalition*, 548 N.E.2d 153, 162 (Ind. 1989).

As we indicated in our Order in Cause No. 43071, the main docket of this proceeding, in making a determination concerning attorney fees, the Commission is required to review the requested attorney fees using a reasonableness standard that balances the competing goals of fairly compensating the attorneys and of protecting the interests of the members in the fund. *Citizens Action Coalition of Ind. v. PSI Energy,* 664 N.E.2d 401, 406 (Ind. App. Ct. 1996). Although Indiana courts have not mandated any particular method of calculating attorney fees in common fund cases, the commonly used methods are the percentage method and the lodestar-multiplier method. *Id.* at 406-407.

The Indiana Supreme Court has found that the Commission has discretion to use either the lodestar method or the percentage method, and its discretion is not limited by the evidence presented by the parties. *Id.* at 408. The Indiana Supreme Court also noted that courts have found it advantageous to use both methods to double check the fee and confirm that the lodestar-multiplier method does not award an exorbitant hourly rate and the percentage method does not dwarf the class recovery. *Id.* at 406, n.4. Regardless of what method is used, however, the award must not exceed what is "reasonable" under the circumstances of the case. *Id.* at 410; *Community Care Centers, Inc. v. Ind. Family and Social Services Admin.*, 716 N.E.2d 519, 551 (Ind. Ct. App. 1999).

The Clay Class seeks an attorney fee award of 40% of the fund. While Mr. Jonas opines that attorney fees of 40% of a recovery are common in the legal profession, he neither offers, nor provides, any support for his opinion. Instead, he appears to rely upon the contract he entered into with two clients that provides for the payment of attorney fees at an hourly rate of $225 per hour, not to exceed 40% of all amounts recovered on behalf of the Clay Class, to support his request for attorney fees in the amount of 40% of the refund.[1] Furthermore, while the contingency fee contract entered into by the Clay Class with counsel caps the attorney fees at 40%, that fact alone does not support a conclusion that 40% is a reasonable attorney award in this particular case.

Courts have noted there is no consensus on how to determine a reasonable percentage for attorney fees in common fund cases. *In re Unisys Corp. Retiree Med. Bene. ERISA Lit.,* 886 F. Supp. 445, 460 (E.D. Pa. 1995). Many courts have recognized 25% of the refund as a "benchmark" or starting point in determining the appropriate percentage for common fund fee awards. *Id.* at 462; *Citizens Action Coalition of Ind.,* 664 N.E.2d at 410. *See also,* Alba Conte, *Attorney Fee Awards, 3rd Ed.*, § 2.8, (2004) p. 115 and 123 noting normal range of common fund attorney fee awards are between 20 to 30% of the fund and this range reflects the economies of scale inherent in class action litigation so that the range is less than the 33 to 40% norm for contingent fee agreements in personal injury and commercial litigation.

The Commission, in its decision on remand from the Court of Appeals concerning the attorney fee award in the Marble Hill litigation, considered the following factors in determining the reasonableness of the percentage award: benefits to ratepayers from the litigation, length and complexity of the issues, risks involved in the litigation, and the experience and skill of counsel. *See, Petition of PSI Energy, Inc.*, Cause Nos. 39498 and 39786 (IURC 11/8/1996), 1996 Ind. PUC LEXIS 475, *27-35 ("*PSI Energy*"). Other courts have considered similar factors. *See e.g., Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2nd Cir. 2000), considering time and labor expended by counsel, magnitude and complexity of case, risk of litigation, quality of representation, the amount of the requested fee in relation to the fund, and public policy considerations. Similar factors are also identified in Rule 1.5 of the Indiana Rules of Professional Conduct concerning the reasonableness of an attorney's fee agreement with a client.

Consequently, the Commission finds that in determining a reasonable percentage for attorney fees in common fund cases, it is appropriate to use 25% of the fund as a benchmark percentage and make adjustments based upon the particular facts of the case. As indicated above, factors to consider in making adjustments, may include, but certainly are not limited to:

a. benefits to ratepayers from the litigation;
b. magnitude and complexity of the case;
c. risks involved in the litigation;
d. experience and skill required by counsel;

[1] We note that the contract, Exhibit RWJ-1, is for representation "on all claims arising from sewage rate overcharges" and issues related to "the pending sewage rate case." No reference is made to the fire protection charge at issue in this Cause. However, in the underlying cause, Cause No. 43071, Clay Class submitted Exhibit RWJ-1, which is a fee contract with another client concerning representation "on all claims arising from Sewage Rate overcharges and water rate overcharges" and also provides for a $2,000 retainer.

e. time and labor required by counsel;
f. size of the fund and the amount of the requested fee in relation to the fund;
g. awards in similar cases;
h. the undesirability of the case;
i. time limitations, if any, imposed by the case;
j. customary fees; and
k. public policy considerations.

We also note that courts have considered these same factors in determining the appropriate multiplier to use in the lodestar calculation. *Goldberger,* 209 F.3d at 47.

The benefit to the ratepayers in this Cause is a refund of the $0.94 monthly fire protection charge collected by the City of South Bend during the period of October, 1999 through September, 2002. *City of South Bend,* Cause No. 43071 (IURC 4/18/2007). Consequently, individual ratepayers are entitled to refunds in amounts ranging from $0.94 to $33.84, with the total to be refunded of $51,120.18 plus interest. Although individual ratepayers will certainly receive a monetary benefit from the Clay Class attorneys' efforts, it is clear the total monetary amount is relatively small. In addition, unlike the benefits in the *PSI Energy* case, ratepayers will not receive any further benefits from this litigation in the future.

While the issue of the fire protection charges has been pending for a number of years, we believe, based on the evidence, that the length of time the issue has gone unresolved has not been due to the complexity of the issue, but due primarily to factors related to representation of the Clay Class on other issues. As Mr. Jonas testified, his representation of the Clay Class involved several issues raised in a complaint originally filed in St. Joseph County Superior Court on August 19, 2003. Exhibit RWJ, Q&A 6. The fire protection charge was "only a small portion of the entire project." *Id.* Q&A 3. And, while the issue of the fire protection charge was raised in the complaint, it did not become a focus in the litigation until the Motion to Correct Error was filed on April 12, 2006. South Bend Petition, ¶ 5. South Bend then investigated the alleged overcharges and offered to provide a refund in May, 2006. *Id.* ¶ 6. However, a dispute arose concerning South Bend's offer, which prompted the filing of South Bend's Petition with the Commission on June 12, 2006. This is not a case like *PSI Energy* wherein the parties were dealing with multiple, new and complex issues. This case involved the single issue of South Bend's collection of fire protection charges during a period of time in which such a charge was not reflected in its Commission approved tariff and which South Bend agreed should not have been assessed. The duration and amount of the charges could be, and was, easily determined by a review of the utility's records. Consequently, not only were the issues concerning the refund of the fire protection charges relatively straightforward, but were ones that should not have required counsel with substantial knowledge and experience in utility law.

Although the fee agreement offered by Mr. Jonas indicates that representation of the Clay Class would be on a contingent basis, the litigation risk with regard to the fire protection charge would appear to be minimal since the probability of success on the claim could be easily determined by a review of the utility's tariff and either Mr. Jonas' client's or the utility's billing records. This is further supported by the evidence which reflects that once South Bend investigated the alleged overcharges, South Bend quickly agreed that a refund should be made. In addition, it appears from Exhibit RWJ-1 submitted in Cause No. 43071, that not all representation was on a contingent fee basis since at least one client provided a retainer to Clay

Class counsel, which further decreases the litigation risk.

Consequently, based on the facts and circumstances involved in this Cause, we believe that an attorney fee award of 40% of the fund is unreasonable. Not only would an attorney fee percentage of 40% consume a significant portion of the fund owed to ratepayers based on the size of the fund, but none of the factors identified above provide any support for increasing an attorney fee award above the benchmark percentage of 25%. The issue involved in this Cause was not novel or complex and involved a small, easily verifiable amount of money. In addition, while some of the factors discussed above may justify a decrease from the benchmark, we do not believe that a decrease is warranted because at least two of the factors, the size of the fund and the length of time this Cause has been pending, could justify an increase from the benchmark. Therefore, based on the factors in this Cause, we believe that 25% of the fund is a reasonable percentage award for attorney fees.

Mr. Jonas and Mr. Miller also provided exhibits containing time entries for work conducted on behalf of the Clay Class to support the request for an attorney fee award of 40% of the fund. However, neither attorney kept time records based upon the issue for which the work was being performed. Instead, both attorneys indicated that they identified the entries in which they believed the work could be partially attributable to the issue concerning the fire protection charge and apportioned 33% of the time to that entry. Mr. Miller also indicated that he adjusted other entries by 20% to account for interruptions in work that likely occurred.

Under the lodestar-multiplier method, the number of hours reasonably expended on the case is multiplied by a reasonable hourly rate, which then may be enhanced, if necessary, with a multiplier to arrive at a reasonable fee. *Citizens Action Coalition,* 664 N.E.2d at 404 n1. The burden of proof is on counsel to provide appropriate documentation and support for the hours expended. *Zeffiro v. Capital First Corp.,* 574 F.Supp. 443, 445 (Pa. D. 1983). Although Clay Class counsel failed to provide any evidence supporting the hourly rate of $225 as reasonable, no party took issue with the hourly rate. In addition, based upon our review of other attorney fee cases previously before the Commission, we do not find the hourly rate of $225 for attorneys located in South Bend, a city smaller than Indianapolis, to be unreasonable. *See e.g., In re Commission Investigation of Northern Ind. Pub. Serv. Co.*, Cause No. 41746 S1 (IURC, 7/2/2003) (finding $275 per hour in the Indianapolis area to be reasonable).

With respect to the number of hours, we have several concerns that the 167.32 hours estimated by Clay Class' counsel is reasonable based upon the evidence. First, both attorneys' time records appear to include entries that were not related to this proceeding. Both attorneys include time entries related to a summary judgment motion, when no such motion was filed concerning this issue. Exhibit RWJ-3, p.2, Exhibit RLM-1, p. 4-5. Mr. Jonas' time entries also included an entry on Jan. 8, 2007 that appears to be unrelated to this Cause and an entry on July 19, 2006 that appears to be only partially related. Mr. Williams' time entries from Sept. 5, 2005 through March 25, 2006 included time that was only partially discounted, but was primarily, or at least equally, related to the 20% surcharge for water service that was assessed to out-of-town residents. Exhibit A to the Order on Motion to Dismiss, which was attached to the Petition filed in Cause No. 43071, is supportive of this conclusion as it contains no mention of the fire protection charge, only the 20% water surcharge and addresses the subject matter jurisdiction of

the St. Joseph Superior Court concerning South Bend's water rates.[2]

Second, one of the reasons courts have utilized the lodestar method is because it requires greater attorney accountability by requiring an "explicit accounting" of hours and rates. *Florin v. Nationsbank of Georgia*, 34 F.3d 560, 565 (7th Cir. 1994). When an attorney provides only an estimation of hours expended on a case, the greater accountability offered by the lodestar method over the percentage method is lost. Furthermore, based on the evidence of record, we are concerned that Clay Class counsels' allocation of 33% of their time to the issue involved in this Cause is an over-estimation. While the initial Complaint filed in the St. Joseph Superior Court contained three issues, all parties agreed that the fire protection charge was only a small portion of the case. This is further supported by the substantial time and effort spent litigating the more complex and contentious 20% water surcharge in Cause No. 42779 and 42779 S1 before the Commission and the multiple day trial concerning the sewer issues discussed by Robert Miller.

In addition, the issue involved in this Cause was not complex or novel and should not have been highly contested. Whether a refund was owed and the amount of the refund could be easily determined from a review of the utility's records and South Bend, once the issue became the focus, conducted an investigation into the matter and quickly determined that a refund was in fact owed. Consequently, we have concerns that the amount of time incurred as estimated by the Clay Class counsel is reasonable in light of the circumstances involved, the nature of the issue, and the amount of money in dispute. Therefore, we believe the percentage method is the appropriate method for an award of attorney fees in this Cause.

South Bend shall pay 25% of the fund established in Cause No. 43071 to Clay Class' counsel prior to distribution of the funds as set forth in the Commission's April 1, 2007 Order in Cause No. 43071.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. South Bend shall pay 25%, or $15,652.55, of the fund established in Cause No. 43071 to counsel for the Clay Class for attorney fees.

2. After payment of attorney fees, South Bend shall refund the remainder of the fund, on a pro rata basis, to the customers served by the former Clay Utilities, Inc. from whom a fire protection charge was collected during the period of October, 1999 through September, 2002 as set forth in the Commission's April 1, 2007 Order in Cause No. 43071.

3. Until the disbursement of all money from the fund is completed, South Bend shall file with the Commission, as an attachment to its IURC Annual Report, an accounting for all payments made from the fund.

[2] We also note that even after the St. Joseph Superior Court's ruling on jurisdiction, the Clay Class again sought to dismiss South Bend's petition for resolution of the fire protection charge on jurisdictional grounds in the underlying Cause to this subdocket, Cause No. 43071.

4. This Order shall be effective on and after the date of its approval.

HARDY, GOLC, SERVER AND ZIEGNER CONCUR; LANDIS ABSENT:
APPROVED: DEC 19 2007

I hereby certify that the above is a true and correct copy of the Order as approved.

Brenda A. Howe

Brenda A. Howe
Secretary to the Commission